KURNIA INSURANS (MALAYSIA) BHD

v.

CLARA TAI SAW LAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-71-1999]
27 OCTOBER 1999

LABOUR LAW: *Employment - Dismissal - Order of reinstatement - Effect - Whether to restore the relationship of master and servant - Whether employer invested with all rights over reinstated employee - Failure to comply with lawful command of employer - Whether an insubordination - Whether would justify summary dismissal*

LABOUR LAW: *Industrial Court - Jurisdiction - Industrial Court making an award for dismissal in a complaint for non-compliance - Whether Industrial Court usurping powers of Minister - Whether acting ultra vires Industrial Relations Act 1967 - Industrial Relations Act 1967, ss. 20(1), 33B(1), 56(1)*

The first respondent was employed by the applicant. On 9 June 1995 the applicant terminated the first respondent's employment and following that the Minister of Human Resources referred the dismissal to the Industrial Court. On 22 November 1997 the Industrial Court gave an award directing that the applicant be reinstated within one month ('the first award'). The applicant sought to quash the first award by way of judicial review but was unsuccessful. Subsequently, on 5 February 1999, in purported compliance of the first award, the applicant asked the first respondent to report at the applicant's premises on 9 February 1999. The first respondent alleged that the applicant had not complied with the first award, and on that ground refused to report as requested. And so, on 24 February 1999 the applicant again terminated the employment of the first respondent ('the second termination').

The first respondent alleged that the second termination was unlawful and made without just cause or excuse. The first respondent in the event lodged a complaint, firstly to the Minister of Labour under s. 20(1) of the Industrial Relation Act 1976 ('the Act') for her reinstatement, and secondly to the Industrial Court under s. 56 of the Act for non-compliance of the first award. Following that, on 22 May 1999, the Industrial Court handed down an award whereby it ruled that there was non-compliance of the first award ('the second award').

The applicant contended that the Industrial Court, in making the second award, had misapplied the relevant legal principles, and so applied to the High Court for an order of *certiorari* to quash the said award. The first respondent *inter alia* claimed that the complaint of wrongful dismissal arising out of the second termination under s. 20 of the Act was made without prejudice to her rights, and that being so, questions arose as to: (i) whether the second termination herein was justified; (ii) whether the second termination constituted a new dismissal which ought to take its course under the Act separately from the earlier termination; (iii) whether the first respondent, having accepted the second termination as dismissal without just cause or excuse and made a complaint under s. 20 of the Act, was estopped from complaining on non-compliance of the first award; and (iv) whether the statutory jurisdiction under s. 20 of the Act could be invoked on a without prejudice basis.

Held:

[1] The effect of the order for reinstatement was to restore the relationship of master and servant, ie that the first respondent was and continued to be employed by the applicant. Reinstatement therefore invests in the employer all rights over the reinstated employee including power of disciplinary action (including dismissal) for any fresh misconduct.

[2] An employee is bound to obey a lawful command of an employer and failure to do so is misconduct that justifies summary dismissal. The request made to the first respondent on 5 February 1999 was such a lawful command and the first rspondent, whether she agreed with the request or not, ought to have attended. Her failure to do so and her reply was a clear insubordination.

[3] The second termination was a new event that gave rise to a new termination, and was not part of the first award. That being so, the first respondent could only contend that the second termination was wrongly in fresh proceedings under s. 20(1) of the Act. The first respondent could not mount such challenge in proceedings for alleged non-compliance of the first award under s. 56(1) of the Act.

[4] A new legal regime had replaced the state of affairs created by the first award. Therefore, a new award for a new dismissal founded on misconduct after the first award, cannot be given by the Industrial Court under the guise of non-compliance of the first award. By doing so, the Industrial Court had acted without reference from the Minister, had usurped the powers of the Minister and had acted *ultra vires* the Act.

[5] One cannot invoke a statutory jurisdiction under s. 20(1) on a without prejudice basis. Also, one cannot have the best of both worlds. The first respondent, by unequivocally and unambiguously making the complaint under s. 20(1) of the Act on the second termination, and invoking the statutory jurisdiction of that section, had accepted that the second termination was a wrongful dismissal. She was therefore estopped from contending otherwise or complaining of non-compliance of the first award.

[6] The first respondent has not to date filed an affidavit in opposition to the substantive motion. In the absence of such an affidavit, she is deemed to have admitted the averments of the applicant.

[Application allowed; order of certiorari granted.]

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank [1995] 4 CLJ 283 ***(refd)***

Lian Yit Engineering Works v. Loh Ah Fon & Ors [1974] 2 MLJ 41 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Sykt Bekerjasama-sama Serbaguna Sungei Gelugor Tanggungan Bhd [1999] 3 CLJ 65 ***(refd)***

Menon v. Brooklands (Selangor) Rubber Co Ltd [1968] 2 MLJ 186 ***(refd)***

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Overseas Chinese Banking Corporation Ltd v. National Union of Bank Employees & Anor [1986] 1 MLJ 338 ***(refd)***

Sivaperuman v. Heah Yeong Seok Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union [1995] 2 CLJ 748 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), 33B(1), 56(1)

Rules of the High Court 1980, O. 32 r. 13(1), O. 38 r. 2(3)

Other source(s) referred to:

Industrial Relations – Law & Practice, Aiyadurai, 2nd edn, p 183

For the applicant - Dato' RR Sethu (John Fam & Kanawagi with him); M/s SN Fam & Co

For the respondent - P Kuppusamy; M/s P Kuppusamy & Co

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

This is an application by motion by the applicant, Kurnia Insurans (Malaysia) Bhd. to quash the award of the Industrial Court made on 22 May 1999 pursuant to leave of the High Court granted on 8 July 1999. Briefly the facts are as follows:

> The 1st Respondent was employed by the Applicant. On 9.6.1995, the Applicant terminated the 1st Respondent's services. (See encl. 3 para. 4 Exhibit CAT-1 ("the 1st dismissal") at p. 12.) The Minister of Human Resources referred the 1st dismissal to the Industrial Court of Malaysia which was case No. 4/4-329/1996 ("the 1st Industrial Court case"). (See Encl. 3 para. 5.) The Industrial Court on 22.11.1997 handed down Award No. 56/97 ("the first award") in the first Industrial Court case directing the Applicant to reinstate the 1st Respondent to her former position within one month and to pay backwages and other benefits. (See encl. 3 para. 6 and Exhibit CAT-2 ("the first award") (p. 14).) The application by the present Applicant to quash the first award by way of judicial review was dismissed. (See encl. 3 para. 3.) Nothing arises out of the first award in the present Originating Motion. On 5.2.1999 the Applicant, as employer wrote to the 1st Respondent to report at the Applicant's premises on 9.2.1999 and to see the Applicant's deponent at the latter's office. (See encl. 3 para. 8 – Exhibit CAT-3 (p. 30).)

The 1st respondent on 8 Febraury 1999, ie, a day before the date scheduled, wrote to the applicant who refused to report as requested by the applicant as the 1st respondent took the view that the applicant had not complied with the first award. (See encl. 3 para. 10 exh. CAT-4 (p. 32).) The 1st respondent did not report on 9 February 1999. On 24 February 1999 the applicant, by letter addressed to the 1st respondent terminated the employment of the 1st respondent ("second termination"). (See encl. 3 para. 13 – exh. CAT-5 (p. 34).) The 1st respondent, by letter dated 3 March 1999, responded that she was wrongfully dismissed without just cause or excuse and would pursue the remedies open to her under the Industrial Relations Act ("the Act"). This is a clear reference to s. 20(1) of the Act (as amended). (See encl. 3 para. 14 – exh. CAT-6.). The 1st respondent thereafter made a complaint over the second termination to:

(a) The Ministry of Labour under s. 20(1) of the Act for wrongful dismissal and seeking reinstatement; (encl. 3 para. 16) and

(b) The Industrial Court under s. 56 for non-compliance for the first award (see encl. 3 para. 17 – exh. CAT-8 at p. 41).

The applicant in response denied non-compliance of the first award. (See encl. 3 para. 18 – exh. CAT-9 at p. 43-44.)

The applicant at the oral hearing challenged the complaint of non-compliance and maintained that there was a new dismissal that had to take its course under the Act. (See encl. 3 para. 20.) The Industrial Court on 22 May 1999 handed down the second award and found non-compliance of the first award. (See encl. para. 21 – exh. CAT-11). The Department of Industrial Relations by letter dated 23 June 1999, addressed to the parties, convened a conciliatory meeting on 30 July 1999 pursuant to the 1st respondent's complaint of wrongful dismissal arising out of the second termination. (See encl. 5 para. 4 exh. CAT-10).

The applicant challenged the second award. The applicant contended that the Industrial Court misunderstood and misapplied the relevant legal principles and despite the ouster clause found in s. 33B(1) of the Act, this Court has jurisdiction to review and quash the award if the grounds contended for are made out. In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 (CA), the Court of Appeal held:

> Held, dismissing the appeal:
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> (Per Gopal Sri Ram JCA) Parliament has attempted to exclude judicial review of the decisions of the court by providing in s. 33B(1) of the Act that an award, decision or order of the court under the Act shall be final and conclusive. However, an inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not. Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by an ouster clause however widely drafted.
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> ... A judicial arbiter should not place an interpretation upon any Act of Parliament which has the effect of producing a result opposite to that intended by the collective will of the legislature as gathered from the words of the Act and from such other sources as the law declares admissible. The Act is a piece of social legislation to promote industrial harmony, the interpretation of which should be liberal in order to achieve the object aimed at by Parliament.
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> ... When Parliament enacted s. 33(1) and (2) of the Act, it intended to meet two distinct situations that so often arise in the course of industrial adjudication. Section 33(1) deals with an interpretation of an award or an agreement, while s. 33(2) is intended to cover a situation where a variation of an award or collective agreement is sought by one of the parties thereto.

...

...

... The Court, faced with the respondent's application under s. 33(1) of the Act, was under a statutory duty to interpret the first award and the two relevant articles in the collective agreement. Since the Act does not prescribe uncertainty or ambiguity as a condition precedent to the exercise of the jurisdiction in question, the court most certainly erred in construing s. 33(1). Further, by conducting a search for an ambiguity and uncertainly in the first award, the court took into account an irrelevant consideration and asked itself the wrong question when undertaking the decision-making process. It was thus quite clear that the court made an error of law in the second award.

... Accordingly the second award was invalid and was liable to be quashed by *certiorari*. The court having failed to perform its duty under s. 33(1) of the Act, it was right that the High Court remitted the matter to the court with a direction that it considered the respondent's application according to law.

In *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungei Gelugor Tanggungan Bhd.* [1999] 3 CLJ 65 (FC), the Federal Court held:

(7) The Privy Council case of *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1981] AC 363 maintains the distinction between error of law on the face of the record and an error of jurisdiction. The Privy Council refused to follow the opinion of Lord Denning in *Pearlman v. Keepers & Governors of Harrow School* [1979] QB 56 that the distinction between error of law within jurisdiction and without jurisdiction should be discarded. The Court holds that Lord Denning's view in *Pearlman* is to be preferred to that of the Privy Council in the *Fire Bricks* case, which should no longer be considered good law. To hold otherwise would mean that a tribunal could misinterpret the law without worrying about interference and the tribunal would become the final judge of the law, thereby violating the constitutional principle that it is the High Court which determines the meaning of legislation and not any other entity. Therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause of the 'not to be challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and inferior courts (see pp. 42H-I and 45F1); *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1981] AC 363 not followed, *Pearlman v. Keepers Governors of Harrow School* [1979] QB 56 followed.

The effect of the order for re-instatement was to restore the relationship of master and servant, ie, that the 1st respondent was and continued to be the employee of the applicant.

In *Sivaperuman v. Heah Yeong Seok Realty Sdn. Bhd.* [1979] 1 MLJ 150 at p. 151 Abdoolcader J said:

> In view of the case of the appellant's dismissal pending before the Industrial Court which has jurisdiction to make an award *inter alia* or reinstatement or re-employment, the circumstances would in my view be exceptional within the principle and *raison d'etre* of *Hill* and a refusal of the interlocutory injunction sought by the respondents would be justified on that score alone although this would in effect be tantamount to treating the relationship of master and servant, although terminated, as still subsisting and thus appear to breach the general rule.

Aiyadurai *Industrial Relations – Law & Practice* (2nd edn) at p. 183 said:

> The Industrial Court has clarified what 'reinstatement' means, and has indicated how 're-employment' differs from reinstatement. In *Han Chiang High School & Anor and National Union of Teachers in Independent Schools* (Award 330 of 1990) the court stated:
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> The law is clear on the issue of reinstatement:
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> > 'Reinstatement requires the employer to treat the employee as if he had never been dismissed, thus restoring all pension, pay, holiday, and seniority rights, and arrears of pay must be made to the employee' (Employment Protection) *Jowitt's Dictionary of English Law* (2nd cumulative supplement to the 2nd Ed. P. 140).
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> Furthermore:
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> > The effect of an award of reinstatement is merely to set at naught the order of wrongful dismissal of a workman by the employer and to reinstate him in the service of the employer and to restore him to his former position and status as if the contract of employment originally entered into has been continuing. Malhotra *Law of Industrial Disputes* (Vol. 24th Ed) p. 934.
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> Then, in *Rang Xerox Ltd. and Chng Siw Sing* (Award 119) of 1990):
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> > The general rule in industrial adjudication is that when a workman is reinstated then, in the absence of cogent reasons, the workman should be entitled to the full wages or remuneration which he would have received had he continued in service. The effect of reinstatement is that the workman is restored to his former position insofar as his capacity, status, and emoluments are concerned. The workman is restored to his former position and status, setting aside his discharge or dismissal from service as if it never had occurred, and he gets all the benefits of continuity of service.

Reinstatement therefore invests in the employer with all rights over the reinstated employee including power of disciplinary action (including dismissal) for any fresh misconduct. An employee is bound to obey a lawful command of an employer and failure to do so is misconduct that justifies summary dismissal.

In *Menon v. Brooklands (Selangor) Rubber Co. Ltd.* [1968] 2 MLJ 186 (FC) the Federal Court held:

> Held: in this case the contumacious manner in which the appellant refused to obey instructions to see the manager of the estate went beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and employee and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position. The appeal was therefore dismissed.

The request made to the 1st respondent by letter dated 5 February 1999 (exh. CAT-3) was such a lawful command. The 1st respondent, whether she agreed with the request or not, ought to have attended. Her failure to do so and her reply (CAT-4) was a clear insubordination. This was a fresh event subsequent to the first award. The 1st respondent could contend that the second termination was wrongful but she had to do so in fresh proceedings under s. 20(1) of the Industrial Relation Act. This challenge cannot be mounted in proceedings for the alleged non-compliance of the 1st award under s. 56(1) of the Industrial Relations Act. The second termination was a new event that gave rise to a new termination, the second termination. Hence, it was not part of and thus outside the scope of the first award.

A new legal regime had replaced the state of affairs created by the first award and hence it was a new termination that attracted a new recourse for redress under the Act. Therefore, a new remedy for a new dismissal founded on misconduct after the first award, cannot be given by a different authority (ie, the Industrial Court) under the guise of non-compliance of the first award given for a dismissal that arose for a different misconduct.

By doing so, the Industrial Court had acted *ultra vires* the Act by usurping the powers of the Minister and without a reference from the Minister which reference was the source of the jurisdiction of the Industrial Court for a claim of wrongful dismissal for a workman under s. 20. The legality or otherwise of the second termination was a matter for separate and independent proceedings following upon the complaint made by the 1st respondent. The first award so far as it concerned the reinstatement had been superseded or spent by the 2nd termination.

In *Lian Yit Engineering Works v. Loh Ah Fon & Ors.* [1974] 2 MLJ 41:

> The respondents, employees of the applicants, had absented themselves from work and gone on strike in protest against the dismissal of two of their colleagues. They were subsequently dismissed by the applicants. The matter was referred to the Industrial Court which held that the dismissal of the two workers by the management was inequitable and without just cause or excuse; that there was no lockout by the management and that there was a strike but it was a legal strike. The Industrial Court ordered the workers to be reinstated. On the motion for a *certiorari* it was argued that the record of the proceedings of the Industrial Court contained two errors on the face of the record, that is, (1) in finding that the dismissal of the workers by the applicant was improper or unjustified; (2) in not finding that the workers themselves terminated their services having broken their contract of service by going on strike and continuously absenting themselves from work for more than two days.
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> Held: (1) in the light of sections 13 and 15 of the Employment Ordinance it would seem clear that a worker who continously absents himself from work for more than two days without reasonable excuse commits a wilful breach of the contract of service for which the employer may terminate his service without notice;
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> (2) in this case the Industrial Court failed to consider whether the workers did continuously absent themselves in circumstances falling within section 15(2) of the Employment Ordinance;
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> (3) as the matter in dispute in this case fell within sub-section (3) of section 12 of the Industrial Relations Act, 1967 the strike was illegal. The Industrial Court erred in law in finding that the strike was legal;
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> (4) since there were errors on the face of the record, the decision of the Industrial Court should be quashed.

It is to be noted that *Syarikat Kenderaan Melayu Kelantan* case stated that:

> ... *Lian Yit Engineering Works* [1074] 2 MLJ 41, though disapproved of or overruled by the Board, must now be taken to have always correctly stated the law.

Upon a reinstatement even the rights of an employer to transfer the reinstated employee continue to exists. In *Overseas Chinese Banking Corporation Ltd. v. National Union of Bank Employees & Anor.* [1986] 1 MLJ 338 there was:

> ... an application for an Order of *Certiorari* to quash an award of the Industrial Court ordering the applicant to reinstate its employee, Wong Lee Sim (Wong) to his former post of Book-keeper or to any recognised post established for a Special Grade Clerk.

...

Held, allowing the bank's application: (1) the court fell into the error of asking itself the wrong question by an over-emphasis on the aftermath of the transfer. It was said that Wong had been transferred to an inferior post. In doing so the Court overlooked the fact that the posting to the Credit Administration Department was itself an interim measure and had to be carried out at short notice pending the outcome of the inquiry;

(2) the order of reinstatement itself is superfluous because Wong had never lost his job as a Special Grade Clerk in the Bank;

(3) the order of reinstatement as Book-keeper was contrary to Article 16(1) of Award 117/82 as it deprived the Bank's right to transfer its employees at its sole discretion.

In the instant case the 1st respondent herself had elected and accepted the applicant's letter dated 24 February 1999 (exh. CAT-5) as dismissal without just cause or excuse and made a complaint to the Director of Industrial Relations under s. 20. The Director had entertained the complaint as one of wrongful dismissal. Therefore it is clear that the 1st respondent could not and ought not to have complained of non-compliance of the 1st award. The 1st respondent had unequivocally and unambiguously taken a stand on the second termination as a dismissal.

In *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank* [1995] 4 CLJ 283; [1995] 3 MLJ 331 (FC) the Federal Court held:

(2) The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

...

(5) Even though estoppel was not pleaded as required under O. 18 rr. 7(1) and 8(1) of the Rules of the High Court 1980, the material facts giving rise to the estoppel were sufficiently pleaded without actually using the term 'estoppel. Furthermore, considerable evidence on the point was led at the trial by the respondent without objection from the appellant.

(6) A court may permit a litigant to argue an unpleaded estoppel if it is in the interests of justice to do so. It is a matter within the discretion of the judge who must have due regard to all the circumstances of the case, including any prejudice that may be caused by the affected party being taken by surprise. Nevertheless, such departures should rarely be permitted, for otherwise, the rule that a party is bound by its pleadings will be rendered meaningless.

Further, the alleged non-compliance of the order for reinstatement has become academic by reason of the second termination. The Industrial Court in its second award did not consider these aspects.

Another point is that the respondent has not, up to today (ie, 27 October 1999) filed an affidavit in opposition to the substantive motion. In the absence of such an affidavit, the respondent is deemed to admit the averments of the applicant. See *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 CLJ 609; [1995] 1 MLJ 287, 288 (CA). It is observed that the affidavit filed in support of the respondent's motion to strike out cannot be read because it was filed to support that motion and nothing. Further no notice was given by the respondent that they intend to sue that affidavit to oppose the substantive motion. Though there is a provision in the Rules of the High Court O. 32 r. 13(1) for notice in relation to summons there is no such rule for motions. Order 38 r. 2(3) provides for use of affidavits in proceedings commenced by originating motions. The respondent claimed that she made the complaint of wrongful dismissal arising out of the second termination under s. 20 Industrial Relations Act without prejudice to her rights. First, the respondent had not produced any letter of complaint. Secondly, there can be no such reservation when invoking the jurisdiction of a tribunal. She was bound by that complaint and its legal consequences. Thirdly, this is a proper case of termination and hence the procedure under s. 20, and not non-compliance of the first award, so far as it is related to reinstatement.

What is also important is that one cannot have the best of both worlds. In fact there can be no question of without prejudice becaus the respondent made a complaint of non-compliance and then made the complaint of wrongful dismissal. The 1st respondent's conduct in making the complaint under s. 20(1) Industrial Relations Act on the second termination was an unequivocal and unambiguous act. By this complaint the statutory jurisdictions under s. 20(1) Industrial Relations Act is invoked. One cannot invoke a statutory jurisdiction on a without prejudice basis. By making the complaint under s. 20(1) Industrial Relations Act the 1st applicant had accepted that the second termination was a wrongful dismissal and hence was estopped from contending otherwise.

For these reasons I am of the view that the notice of originating motion dated 15 July 1999 in encl. (6) should be allowed and the applicant be granted an order of *certiorari* to quash the Industrial Court Award No. 252 of 1999 dated 22 May 1999 and costs.